

**SEP - 3 1991**

District Director  
Chicago Key District

ATTN: Mike Murphy, Farmers' Cooperative Industry Specialist

Chief, CC:P&SI:b

**Request for reconsideration of Technical Assistance**

This is in response to Mike Murphy's (the Farmers' Cooperative ISP Industry Specialist) request that we reconsider part of our response to a request for technical assistance issued on June 13, 1991, (copy attached) regarding the application of section 1388(j) of the Internal Revenue Code. Specifically, he requested that we reconsider our answer to question 5 of the technical assistance.

Question 5 provides that, "If the examining agent notifies the cooperative that it must comply with the notification requirements and the cooperative refuses to do so (either at all or within a reasonable period of time while the examination is open), may the agent then disallow any netting and propose any resulting adjustment?" Our response to that question was: "No. There are no sanctions against cooperatives that fail to notify their patrons. See, Section 1388(j)(3)(C) of the Code."

Upon reconsideration, we believe that the agent may disallow any netting and propose any resulting adjustment if the cooperative refuses to notify the patrons when they are informed of the requirement by the examining agent. Section 1388(j)(3)(C) of the Code provides:

**Failure to Provide Sufficient Notice.--** If the Secretary determines that an organization failed to provided sufficient notice under this paragraph--

- (i) the Secretary shall notify such organization, and
- (ii) such organization shall, upon receipt of such notification, provide its patrons a revised notice meeting the requirements of this paragraph.

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Any such failure shall not affect the treatment of the organization under any provision of this subchapter or section 521. [Emphasis added]

In our reconsidered opinion the "shall" notify requirement of section 1388(j)(3)(C)(ii) of the Code is an imperative. Failure to obey such an imperative leads to the necessary conclusion that the benefits of section 1388(j) are denied. We do not believe that the last sentence of the section overrules the imperative when it provides that any failure will not affect the treatment of the organization under subchapter T. Rather, we interpret the word "failure" in that sentence as referring to the initial failure to supply sufficient notice that the Secretary has brought to the attention of the organization. That is, merely because the initial notice was deficient (or nonexistent) will not disqualify the organization from the benefits of subchapter T. However, failure to provide the required notice after the Secretary informs the organization of its deficiency will deny the organization the benefits of section 1388(j) because such notice is a mandatory requirement that must be met in order to avail oneself of the benefit of the section. Any other interpretation of the last sentence would render the notice requirement of section 1388(j) a nullity. Clearly, Congress did not intend such a result. Accordingly, we believe that the examining agent may deny the netting benefits of section 1388(j) if the cooperative fails to adhere to notice requirements when informed to do so.

We hope this response will clarify the issue for you. Should you have any questions, or wish to discuss this matter further contact Patrick McGroarty at FTS 377-6349.